

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA,**

**Plaintiff,**

**v.**

**TYSON FOODS, INC., et al.,**

**Defendants.**

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**Case No. 05-CV-329-GKF-PJC**

**STATE OF OKLAHOMA'S REPLY TO DEFENDANTS CARGILL, INC. AND  
CARGILL TURKEY PRODUCTION, LLC'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' [SIC] MOTION FOR PARTIAL SUMMARY JUDGMENT (DKT. #2062)**

The State of Oklahoma (“the State”) respectfully submits this reply to “Defendants Cargill, Inc. and Cargill Turkey Production, LLC’s Memorandum in Opposition to Plaintiffs’ [sic] Motion for Partial Summary Judgment (Dkt. No. 2062)” (“Response”). Dkt. #2200.

The State’s summary judgment evidence is varied, diverse and overwhelmingly shows that land applied poultry waste from the Cargill Defendants’ birds is a significant source of the phosphorus impairments found in the waters of the Illinois River Watershed (“IRW”). The Cargill Defendants’ Response fails to raise any genuine question of material fact. The State’s Motion for Partial Summary Judgment (“MSJ”) should be granted.

### **Discussion of Facts**

Importantly, the Cargill Defendants admit that “[p]oultry litter is one of multiple sources of phosphates in the watershed . . . .” Resp., ¶ 44 (emphasis added). Dr. John Connolly acknowledges in his testimony cited by the Cargill Defendants that non-point source runoff to the waters of the IRW is “significant.” *See id.* & Dkt. #2207 (Connolly Depo. at 107). There is no genuine dispute that the Cargill Defendants’ birds “generate an enormous amount of poultry waste annually” in the IRW, *see* MSJ, Facts, ¶¶ 22 & 24; Resp., ¶¶ 22 & 24,<sup>1</sup> that the Cargill Defendants “are aware that it is and has been the practice to apply the poultry waste generated by their birds in the IRW to the land in the IRW,” *see* MSJ, Facts, ¶ 28; Dkt. #2091-5,<sup>2</sup>

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<sup>1</sup> The Cargill Defendants argue that their “own estimates for the amount of litter produced in the IRW during similar time periods are significantly less” than the State’s estimates. Resp., ¶ 22. However, in the testimony cited by the Cargill Defendants, Mr. Alsup admits that the Cargill litter estimate is “rough” and not based on “hard data.” *See* Dkt. #2079-3 (Alsup Depo. at 150). Such a rough estimate is insufficient to create a material dispute of fact with respect to the State’s thoroughly researched and well-reasoned waste estimates. Nonetheless, the Cargill Defendants’ own flawed estimates still show that their birds produce “enormous amounts of poultry waste annually” in the IRW. *See* Exs. G and H to Response (*Filed Under Seal*).

<sup>2</sup> The State has presented a December 5, 2004 advertisement placed by Cargill and other Defendants which states: “Lately, a good deal of concern has been raised about the effect of excess nutrients on the land and waters of Eastern Oklahoma. So where do these nutrients come

that, based on available ODAFF records, “[s]ignificant amounts of poultry waste from” the Cargill Defendants’ birds “have been land applied in the IRW,” *see* MSJ, Facts, ¶ 32; Resp., ¶ 32; Dkt. #2088-4; Dkt. #2076-2 (Fisher Depo. at 184-93), that poultry waste -- including poultry waste from the Cargill Defendants’ birds -- has been over applied in the IRW, *see* MSJ, Facts, ¶ 39; Resp., ¶ 39,<sup>3</sup> or that the “largest contributor to the phosphorus loadings during high-flow events is from non-point sources . . . ,” *see* MSJ, Facts, ¶ 43; Resp., ¶ 43.<sup>4</sup>

Moreover, the Cargill Defendants have provided no evidence contrary to the State’s supported statement of fact that “surface water and groundwater of the IRW are highly susceptible to pollution from phosphorus from land applied poultry waste because of the terrain and geology of this area, the manner of land application, and the nature of poultry waste,” *see* MSJ, Facts, ¶ 46; Resp., ¶ 46,<sup>5</sup> or that “Defendants have long been aware that the land application of poultry waste in the IRW presented a serious *risk* of potential environmental impact due to run-off and leaching,” *see* MSJ, Facts, ¶ 47 (emphasis added); Resp., ¶ 47.

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from? Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer. . . .” *See* MSJ, Facts, ¶ 28; Dkt. #2091-5. Defendants’ own expert, Dr. Dicks, has conceded that historically the predominant use of poultry waste has been to land apply it. *Id.* at ¶ 28. In their Response, the Cargill Defendants do not address the 2004 advertisement or Dr. Dicks’ testimony in any way, let alone explain how this evidence does not prove the Cargill Defendants’ knowledge concerning land application of poultry waste. Resp., ¶ 28.

<sup>3</sup> While the Cargill Defendants claim that “[n]othing in Plaintiffs’ [sic] cited sources suggests that any turkey litter from any Cargill contract grower has been over-applied in the IRW,” *see* Resp., ¶ 39, the State cited to a Nutrient Management Plan from the Cargill Defendants’ own breeder farms that shows very high soil test phosphorus levels. *See* MSJ, Facts, ¶ 39; Dkt. #2099-3 (CARTP123748) (*Filed Under Seal*).

<sup>4</sup> Rather, the Cargill Defendants merely assert that “[e]xcessive flooding *can* cause elevated phosphorus loadings during high-flow events stemming from point sources” without quantifying the contribution of such point source flooding events and citing only inadmissible unsworn expert reports. Resp., ¶ 43 (emphasis added).

<sup>5</sup> The Cargill Defendants cite the inadmissible expert report and testimony of Andy Davis that provides a hearsay anecdotal observation of “grassy” runoff paths. *See* Dkt. #2207-2 (Davis Depo. at 72-73). The State objects to the Cargill Defendants’ use of unsworn expert reports as they are inadmissible for the purposes of summary judgment. *See Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1463 (D. Colo. 1997).

Additionally, the Cargill Defendants do not challenge *any* of the evidence -- presented in Fact No. 48 -- from governmental entities and non-retained experts confirming that phosphorus contained in poultry waste that is land applied in the IRW can, and does, run-off and leach into the waters of the State. *See* MSJ, Facts, ¶ 48; Resp., ¶ 48.<sup>6</sup> Lastly, the Cargill Defendants do not genuinely dispute that: (a) the levels of phosphorus in the waters of the IRW are very high; (b) segments of the Illinois River and its tributaries have been listed as impaired by phosphorus; (c) a violation of a water quality standard constitutes an injury; or (d) excess phosphorus damages the environment. *See* MSJ, Facts, ¶¶ 49-52; Resp., ¶¶ 49-52.<sup>7</sup>

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<sup>6</sup> In the face of all the evidence presented by the State in Fact No. 48, the Cargill Defendants baldly assert that the “cited sources do not suggest that turkey litter land-applied by any Cargill or CTP contract grower has run off or leached into the waters of the IRW . . .” Resp., ¶ 48. For one, the State *does* present Cargill-specific causation evidence in Fact No. 48(c) -- and elsewhere in the MSJ. *See, e.g.,* MSJ, Facts, ¶¶ 9 (e,f); 10(i); 21-2; 24; 28; 32; 39; 47. While Cargill Defendants attempt to distance themselves from statements made in their own Contract Grower Environmental Best Management Practices Guide cited in Fact No. 48 (Resp. at 10-11), the document speaks for itself. *See* Dkt. #2103-4 (CARTP000009) (*Filed Under Seal*). Whether the Cargill Defendants “authored” the statements in the document or not, they plainly endorsed those statements by adopting them into their own company environmental guide that was distributed to their growers. More important is the fact that Cargill Defendants do not challenge *any* of the evidence from governmental entities and non-retained experts concerning the source of contaminants in the IRW -- they merely claim that this evidence does not specifically identify the Cargill Defendants. For instance, the Cargill Defendants do not deny or present any evidence contrary to the USDA’s findings that “[w]ater quality problems in the Tenkiller and Spavinaw watersheds are due to excessive nutrients, pathogenic bacteria, and sedimentation” and that the practice of land applying poultry waste “has led to the excessive buildup of phosphorus that currently pollutes water bodies” in the IRW. MSJ, Facts, ¶ 48(a). And the Cargill Defendants do not challenge the Arkansas Water Resources Center’s determination that “[n]onpoint source impacts affecting waters in [the IRW] are primarily from pastureland that is also used for application of poultry litter as fertilizer,” *see id.*, or the cited testimony of Randy Young, Executive Director of the Arkansas Natural Resources Commission, that “without question . . . the land application of poultry waste is a significant part of [the water quality problems in the IRW].” *See* Dkt. ##2103-3 (Young Depo. at 209-10); 2062-2 at 3.

<sup>7</sup> The Cargill Defendants cite only to the inadmissible unsworn expert reports of Drs. Davis and Clay in support of the claims that: the State’s cited sources do not suggest that phosphorus levels are “very high” in proximity to any application of turkey litter by any Cargill grower; and the State’s evidence does not show that impaired waterway segments are near Cargill grower sites. Resp., ¶¶ 49-50. Further, both Drs. Davis and Clay are subject to exclusion via *Daubert*

## ARGUMENT

### **I. The State is entitled to summary judgment on its CERCLA claims with respect to the issues of (1) “hazardous substance,” (2) “facility,” and (3) “release”**

#### **A. Phosphorus contained in poultry waste is a CERCLA hazardous substance**

With respect to the “hazardous substance” issue, Cargill Defendants merely refer the Court to “Defendants’ Joint Motion for Summary Judgment on Counts 1 and 2 (Dkt. No. 1872)” (hereinafter referred to as “Dkt. #1872”). Resp. at 12-13. In reply, the State hereby adopts and incorporates its Response in Opposition to Dkt. #1872. *See* Dkt. #1913. The State further adopts and incorporates its “Reply to ‘Defendant Tyson Poultry, Inc.’s Opposition to Plaintiff’s Motion for Partial Summary Judgment with Regard to Plaintiff’s Claims Under CERCLA and RCRA” (“Reply to Tyson Poultry Response”) which is being filed concurrently.

#### **B. The State has identified proper CERCLA facilities<sup>8</sup>**

The Cargill Defendants argue that the State has failed to “identif[y] a single specific farm or field that . . . constitutes a CERCLA facility” or “define the boundaries of such a facility.” Resp. at 13. The IRW as a whole is a CERCLA facility because phosphorus from land applied poultry waste has come to be located throughout the IRW. As such, the IRW as a whole fits

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challenges filed by the State. *See* Dkt. ##2064 and 2061. Dr. Davis made no determination of whether poultry waste had actually been land applied at the sites in question -- or whether the waste had been land applied elsewhere in the IRW. Also, the Cargill Defendants do not challenge the statements made in Facts No. 49 and 50 in general. The Cargill Defendants’ attempts to dispute Facts No. 51 and 52 are frivolous as Dr. Ginn admitted in sworn testimony that “. . . if there was an exceedence of a state water quality standard, then that would be an indication that there had been a defined injury to surface water, per se . . . .” *See* Dkt. #2103-18 (Ginn Depo. at 37).

<sup>8</sup> With respect to the CERCLA facility issue, the Cargill Defendants again refer the Court to Dkt. #1872. In reply, the State again adopts and incorporates its Response in Opposition to Dkt. #1872 (*See* Dkt. #1913 at 21-5); and further adopts and incorporates its “Reply to Tyson Poultry Response” filed on this date, June 19, 2009.

under CERCLA's broad definition of "facility." *See* Dkt. #1913 at 21-5; MSJ at 36-7.<sup>9</sup> The Cargill Defendants' position on this issue is nothing but a "thinly veiled attempt[] . . . to avoid responsibility for contamination." *See Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 419 (4th Cir. 1999). And contrary to the Cargill Defendants' arguments, the State's MSJ contains ample evidence to support its alternative contention that the grower buildings, structures, installations and equipment, as well as the land to which poultry waste has been applied, are CERCLA facilities. *See, e.g.*, MSJ, Facts, ¶¶ 21, 30 & 33.

The Cargill Defendants argue that the State lacks standing to seek partial summary judgment with respect to any location for which the State "do[es] not allege one of the Cargill Defendants is responsible . . . ." Resp. at 14. The State's evidence shows that phosphorus from the Cargill Defendants' birds has been released into the IRW and contributed to a widespread indivisible injury to its water. *See, e.g.*, MSJ, Facts, ¶¶ 9(e,f), 21, 22-24, 28, 30, 32, 39, 44, 47, 48 & 50. "It is . . . well settled that § 107 imposes joint and several liability on PRPs regardless of fault." *United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 1535 (10th Cir.1995). The Cargill Defendants' piecemeal standing argument is misplaced because it is inconsistent with and would vitiate CERCLA joint and several liability.

**C. The Cargill Defendants cannot establish that the CERCLA fertilizer exception applies**

To support their argument that the CERCLA fertilizer exception bars the State's CERCLA claims, Cargill Defendants rely upon Dkt. #1872 and page 10 of their memorandum in support of summary judgment (Dkt. #2079). The State has responded to these arguments in Dkt.

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<sup>9</sup> *See also, e.g., Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 fn 3 & 1074 (9th Cir. 2006); *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1174 (10th Cir. 2004); *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998); *Nutrasweet Co. v. X-L Eng'g Corp.*, 933 F.Supp. 1049, 1417-18 (N.D. Ill. 1996); *Cytec Indus., Inc. v. B.F. Goodrich Co.*, 232 F.Supp.2d 821, 835-36 (S.D. Ohio 2002).

#1913 and in the State’s Response to the Cargill Defendants’ Motion for Summary Judgment (Dkt. #2178 at 11-13), which the State adopts and incorporates herein. The Cargill Defendants have clearly *not* established that the fertilizer exception applies. *See, e.g.*, MSJ at 37-8.<sup>10</sup>

**II. The State is entitled to summary judgment with respect to that portion of its RCRA claim alleging endangerment to the environment from phosphorus**

**A. Poultry waste is a RCRA solid waste<sup>11</sup>**

The Cargill Defendants baldly assert that the State had “cited no specific facts suggesting whether or how any Cargill Defendant or Cargill contract grower has ‘discarded’ turkey litter in a manner to bring it within 42 U.S.C. § 6903(27).” Resp. at 15. However, this is simply false. The State has presented evidence establishing that poultry waste from Cargill Defendants’ birds is discarded in the IRW. *See, e.g.*, MSJ, Facts, ¶¶ 22, 24, 25, 28, 32, 39, 44 & 48. Furthermore, the Cargill Defendants have provided no evidence contrary to the State’s supported statements of fact that “poultry waste generated by Defendants’ birds has no beneficial use *in the poultry growing / feeding process*”; and “it is not reused, recycled or reclaimed *for feeding or growing poultry*.” *See* MSJ, Facts, ¶ 25 (emphasis added); Resp., ¶ 25.

**B. Defendants are “contributors”<sup>12</sup>**

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<sup>10</sup> The Cargill Defendants also claim that the State’s “reliance on [its] self-characterized ‘Disputed Facts’ (Dkt. No. 2062, citing Dkt. No. 1913, ‘Disputed Material Facts ¶¶ 10-18’), undercuts any claim of entitlement to summary judgment on this issue.” Resp. at 15. This is a silly argument. Obviously, facts presented in response to a motion for summary judgment are presented in order to demonstrate that the *movant’s* statements of fact are disputed. It can also be true, as it is here, that the movant cannot genuinely dispute the respondent’s statement of facts as presented in a response brief. Thus, the State’s reliance on facts presented in response to Defendants’ summary judgment motions “undercuts” nothing. The Cargill Defendants make this same “disputed facts” assertion with respect to the State’s “hazardous substance” and “facilities” arguments. *See* Resp., fn 5. For the same reasons, all of the Cargill Defendants’ “disputed facts” arguments in this regard should be rejected.

<sup>11</sup> In response to the State’s RCRA “solid waste” summary judgment arguments, the Cargill Defendants join Tyson Poultry’s Response to the State’s Motion for Partial Summary Judgment. Resp. at 15. In reply, the State adopts and incorporates its Reply to Tyson Poultry Response filed on June 19, 2009.



The scope of “contributor” liability under RCRA is extremely broad, and the State need merely show that the Cargill Defendants “have a part or share in producing an effect.” *See Cox v. City of Dallas, Texas*, 256 F.3d 281, 294-95 (5th Cir. 2001) (citations omitted). The testimony of Defendants’ own expert, Dr. Michael Dicks, establishes that Defendants -- including the Cargill Defendants -- control all major aspects of the poultry growing process. *See* Dkt. #2065-10 (Dicks Depo. at 115 & 118). The testimony of the Cargill Defendants’ own 30(b)(6) witness shows that the Cargill Defendants specify litter clean-outs and cake-outs of poultry houses. *See* Dkt. #2070 (Alsup Depo. at 45-8; 52-3). Overall, the evidence is not genuinely disputed and shows that the Cargill Defendants “have a part or share in producing” not only the enormous volumes of poultry waste, but also the circumstances and manner in which that poultry waste is handled and disposed of in the IRW. *See, e.g.,* MSJ, Facts, ¶¶10, 12, 26, 28, 30 & 34. Consequently, the Cargill Defendants are RCRA “contributors.”

**C. Phosphorus from land-applied poultry waste may present an imminent and substantial endangerment to the IRW environment**

The Cargill Defendants claim that the State has presented “aggregate” evidence against Defendants, and no evidence “suggesting whether or how these assertions relate to Cargill Defendants.” Resp. at 18. The Cargill Defendants again suggest -- as they did in their Motion for Summary Judgment (Dkt. #2079) -- that the State must prove its case by direct evidence. Resp. at 18-19. However, it is well established that “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Desert*

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<sup>12</sup> With respect to RCRA “contributor” liability, Cargill Defendants join Tyson Poultry’s Response to the State’s Motion for Partial Summary Judgment. Resp. at 16. The State replies to this joinder by adopting and incorporating its Reply to Tyson Poultry Response. In addition, Cargill Defendants largely repeat the RCRA “contributor” arguments from their Memorandum in Support of Motion for Summary Judgment (Dkt. #2079). The State previously responded to these arguments and adopts and incorporates that response herein. *See* Dkt. #2178 at 14-16.



*Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citation omitted). Specifically, RCRA liability may be established by circumstantial evidence. *See U.S. v. Valentine*, 856 F. Supp. 621, 627 (D. Wyo. 1994). The State's circumstantial evidence -- which is not genuinely disputed -- establishes that land-applied poultry waste from the Cargill Defendants' birds may present an imminent and substantial endangerment to the IRW environment. *See, e.g.*, "Discussion of Facts," *supra*. Under *Burlington Northern & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013 (10th Cir. 2007), summary judgment in favor of the State is thus warranted.

**III. The State is entitled to summary judgment with respect to aspects of its nuisance and 27A Okla. Stat. § 2-6-105 claims<sup>13</sup>**

**A. Cargill Defendants have Restatement (Second) of Torts § 427B-type liability**

Under Restatement (Second) of Torts § 427B and the related case law, the Cargill Defendants are liable for any trespass or nuisance created by their growers because they were aware that in the ordinary course of doing the contract work, a trespass or nuisance is *likely* to result. The Cargill Defendants assert that they cannot be subjected to § 427B-type liability because: (a) the State has not established that any nuisance or trespass actually took place as a result of any Cargill grower's land application of poultry waste; (b) the State has offered no evidence establishing that the land application of poultry waste by any Cargill grower "on any particular farm would be likely to result in the runoff of sufficient phosphorus to cause environmental damage and create a nuisance or constitute a trespass"; and (c) the State has failed to establish that the Cargill Defendants knew or should have known that the land application of

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<sup>13</sup> With respect to the State's common law claims, the Cargill Defendants join Tyson Poultry's Response to the State's Motion for Partial Summary Judgment. Resp. at 16. The State replies to this joinder by fully adopting and incorporating its Reply to Tyson Poultry Response. In addition, the State adopts and incorporates its Response to the Cargill Defendants' motion for summary judgment regarding the State's state law claims. *See* Dkt. #2178 at 14-16 and its reply to the Cobb-Vantress motion on state and federal common law claims, Dkt. # 2185.

poultry litter “by any Cargill Grower on any particular farm” would be likely to result in the runoff. First, the undisputed evidence establishes that a nuisance (or trespass) -- in the form of widespread phosphorus contamination -- has occurred. *See, e.g., “Discussion of Facts,” supra.* As a matter of Oklahoma law, the undisputed evidence is more than adequate to establish Cargill-specific causation. *Id.* Significant circumstantial evidence establishes that Defendants -- including the Cargill Defendants -- are joint tort-feasors whose “acts concur, combine, or commingle to produce an indivisible injury.” *See Boyles v. Okla. Natural Gas*, 619 P.2d 613, 617 (Okla. 1980). Where such an indivisible injury exists: (a) the plaintiff need not trace the precise source of the injury; and (b) each defendant is liable even though its acts alone might not have been a sufficient cause of the injury. *See* Dkt. #2178 at 16-18 (full discussion of Oklahoma’s indivisible injury doctrine). The “particular farm” standard that the Cargill Defendants seek to impose is contrary to Oklahoma law. The undisputed evidence further establishes that: the nuisance (or trespass) was likely to occur and the Cargill Defendants knew that in the ordinary course of growers doing the contract work, a nuisance (or trespass) was likely to result. *See, e.g., “Discussion of Facts,” supra.* Summary judgment should be granted for the State on the issue of §427B-type liability.

**B. The land application of poultry waste from the Cargill Defendants’ birds poses a “significant threat” of injury to the State’s natural resources**

The Cargill Defendants oppose summary judgment on the State’s federal nuisance claim based on unsupported allegations that: (a) the State has failed to establish that Defendants are “responsible” for the land applied poultry waste; (b) the State cites to no evidence suggesting that the land application of poultry waste from the Cargill Defendants’ birds poses a “significant threat” to the environment; and (c) the State has improperly argued that the federal nuisance “significant threat” standard is “akin to the risk-based RCRA standard.” Resp. at 23. First, the

Cargill Defendants are responsible for the land application of poultry waste either under § 427B-type liability or under *respondeat superior*. See, e.g., *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804, 808-09 (Ala. 2000). Second, the undisputed evidence establishes that -- at a minimum -- the land disposal of poultry waste from the Cargill Defendants' birds poses a "significant threat" to the environment of the IRW. See, e.g., "Discussion of Facts," *supra*. Lastly, both RCRA's "may present" an imminent and substantial endangerment standard and the federal nuisance "significant threat" standard are risk-based, requiring similar proof.

**C. The State is entitled to summary judgment on its 27A Okla. Stat. § 2-6-105 claim**

The Cargill Defendants offer no new argument with respect to § 2-6-105, but merely repeat (in summary fashion) their argument from their motion for summary judgment (Dkt. #2079). The State adopts and incorporates its earlier response to that argument herein. See Dkt. #2178 at 18-19. Poultry waste from the Cargill Defendants' birds has been placed or caused to be placed in the Oklahoma portion of the IRW such that phosphorus from that waste is likely to cause pollution to the waters of the IRW. See, e.g., "Discussion of Facts," *supra*.

**D. The State is entitled to injunctive relief**

Lastly, the Cargill Defendants repeat their argument from their motion for summary judgment (Dkt. #2079) that the State does not have standing to seek injunctive relief against Cargill, Inc. because Cargill, Inc. has not operated in the IRW since 2004. The State adopts and incorporates its earlier response to that argument herein. See Dkt. #2178 at 23-25. The State has standing to pursue injunctive relief against Cargill, Inc. due to its long history of prior operations in the IRW and the timing of its cessation of those operations. *Id.*

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 19th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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